PETER CHONG & ANOR v. KHATIJAH MD IBRAHIM (PERSONAL REPRESENTATIVE OF AISHAH IBRAHIM, DECEASED) & ANOTHER SUIT

HIGH COURT MALAYA, GEORGETOWN
LIM CHONG FONG J
[CIVIL SUIT NO: 22NCVC-429-06-2012 & 22NCVC-567-08-2012]
30 OCTOBER 2017

CONTRACT: *Sale and purchase of land – Sale of part of undivided share in piece of land held by Muslim woman under joint tenancy with sister – Both acquired land as gift from late Muslim father – One sister unilaterally executed sale and purchase agreements with plaintiffs but passed away before completing transfer and registration of portions of land – Surviving sister subsequently registered as sole registered proprietor of land – Plaintiffs instituted suits to seek specific performance of respective sale and purchase agreements – Whether gift of land by Muslim father to his children subject to Islamic law – Whether conveyance a hibah ruqba – Whether there was severance of joint tenancy to title of land – Whether suits time-barred – Whether sale and purchase agreements capable of being effected under National Land Code – Whether plaintiffs may claim from estate of deceased sister for restoration of benefits and advantage received – Contracts Act 1950, s. 66 – Limitation Act 1953, s. 9 – National Land Code, ss. 205(1), 214(1)(a)*

The disputes herein involved the sale of part of an undivided share in a piece of land held by a Muslim woman under joint tenancy with her sister who both acquired the land as a gift from their late Muslim father. By a deed of conveyance ('the deed), one R Govindasamy sold a piece of land ('the land') to one Ibrahim Eusoff ('Ibrahim'). The material portion of the deed read '… the vendor, as beneficial owner, hereby conveys to the purchaser all those pieces of land … to hold the same unto the purchaser for and during his life and thereafter to his children Mohamed Ismail, Aishah and Khatijah as joint tenants'. After the deed was perfected, Ibrahim took possession of the land. However, Ibrahim and his son predeceased Aishah and Khatijah. The sisters then took absolute possession of the land and Aishah and Khatijah were recorded as proprietors holding as joint tenants pursuant to the National Land Code (Penang and Malacca Titles) Act 1963. On 3 February 1990, Aishah unilaterally executed a sale and purchase agreement with the plaintiffs in Suit 2 to sell the portion of the land shaded as Plot 9. Subsequently on 17 September 1990, Aishah unilaterally executed another sale and purchase agreement with the plaintiffs in Suit 1 to sell 1,400 square foot of portion of the land shaded as Plot 8. The plaintiffs in both suits paid the purchase price under the aforesaid sale and purchase agreements in full to Aishah and went into possession of both portions of the land. Aishah, however, passed away without having completed the transfer and registration of the portions of the land to the plaintiffs. After the demise of Aishah, Khatijah was registered as the sole registered proprietor of the land.

Consequently, the plaintiffs instituted both suits (Suit 1 and Suit 2) to principally seek specific performance of their respective sale and purchase agreements. Both suits were originally heard before Nantha Balan J, who dismissed both suits. On appeal, the Court of Appeal allowed the appeal by setting aside the aforesaid judgment to be re-tried. The suits consequently came before this court and at case management, the parties agreed to be bound by the earlier findings of Nantha Balan J on the issues raised by the parties except for the sole principal issue of whether the gift of the land by Ibrahim to his children as joint tenants was subject to Islamic law (known then as Mohammedan law) and accordingly repugnant thereto.

Held (dismissing plaintiffs' claims against first defendant; entering judgment for plaintiffs against second defendant for restoration of benefits or advantage received):

(1) Ibrahim had purchased the land and at that same time conveyed the land to his children as joint tenants after his demise. During Ibrahim's lifetime, the land was held by him as trustee for the children. It was a voluntary *inter vivos* gift coupled with a trust for the benefit of his minor children jointly held under joint tenancy ('the conveyance'). The three children of Ibrahim took absolute possession of the land after his death. After the death of the eldest son, the land was registered in both Aishah and Khatijah's name as joint tenants as evidenced by the endorsement in the interim register dated 27 June 1977. Subsequently, after Aishah's death, the land became finally registered in Khatijah's name with 1/1 share as evidenced by the issued document of title dated 19 July 2012. Mohammedan law only applied to property relating to Mohammedan marriage and intestacy. Thus, Mohammedan law did not apply to the conveyance. (paras 39 & 40)

(2) Conveyance was at the time solely governed by English law based on the Conveyancing and Law of Property Ordinance and Registration of Deeds Ordinance. Accordingly, and in light of s. 5(2) of the Civil Law Ordinance, the English common law principle of alienation *rei praefertur juri accresendi* on severance of joint tenancy relied on by the plaintiffs was inapplicable because this principle was not embodied in the aforesaid Ordinances. (para 41)

(3) The unilateral act of Aishah entering into sale and purchase agreements with the plaintiffs did not amount to severance because she did not take formal steps to divest and sever her interests from the joint tenancy by the act of partition of the land and thereafter registration in the names of the plaintiffs' of their portions of the land. Furthermore, there was no consent to the same by Khatijah. There were also no records that the Director of Land and Mines recognised that severance of the joint tenancy had been made to the title of the land. (para 50)

(4) Both the plaintiffs' suits were not time barred as the result of s.9 of the Limitation Act 1953 by reason that the right to commence the actions by the plaintiffs accrued when there was a threat to infringe their rights. The threat of infringement to the plaintiffs' rights were only communicated to them *via* Khatijah's solicitor's letter of demand and the subsequent initiation of the suits were well within the limitation period. (para 50)

(5) The sale and purchase agreements entered between the plaintiffs and Aishah were not capable of being effected under the National Land Code by reason that ss. 205(1) and 214(1)(a) and (b) thereof did not permit the transfer of a part of any undivided share in the land. Furthermore, Aishah's undivided interest had not been assimilated and merged into a single interest owned by Khatijah as the sole survivor under the joint tenancy. Even if Mohammedan law applied, the conveyance being a *hibah ruqba* did not contravene Mohammedan law. (para 50)

(6) The plaintiffs' claims against Khatijah as the first defendant (individual) were unsustainable. However, as for Khatijah, as the second defendant in representative capacity of the estate of her late sister, Aishah, the sale of part of the undivided share of the land could not be effected; the agreement between the plaintiffs and Aishah in respect of the purchase of that portion of the land was thus void. Consequently, by reason of s. 66 of the Contracts Act 1950, the estate of Aishah as represented by the second defendant had to restore the benefit or advantage received from the plaintiffs. (para 52)

(7) The plaintiffs' claim in both suits for specific performance, declarations, injunction and damages in addition to or *in lieu* of specific performance *etc* were untenable in law. That notwithstanding, the plaintiffs may claim from the second defendant only for the restoration of the benefits and advantage received, otherwise to make compensation for it. (para 53)

Case(s) referred to:

Azizunissa Abdurrahman Kadri v. Jamila Abdul Hussein Sheik (deceased by her LRs) & Ors [2007] NOC 2238 Bom LR 769 ***(refd)***

Jack Chia – MPH Limited v. Malayan Credit Ltd [1984] 1 CLJ 401; [1984] 2 CLJ (Rep) 630 CA ***(refd)***

Khoo Hooi Leong v. Khoo Chong Yeok [1930] AC 346 ***(refd)***

Menaka v. Lum Kum Chum [1976] 1 LNS 181 PC ***(refd)***

Mohamed Jusab Abdulla v. Fatamabai Jusab Abdulla AIR (35) 1948 Bombay 53 ***(refd)***

Ng Moh v. Tan Bok Kim [1968] 1 LNS 88 FC ***(refd)***

Re Man Mihat, Decd. [1965] 1 LNS 211 ***(refd)***

Salmah Omar & Ors v. Ahmad Rosli Aziz (Pentadbir Harta Pesaka Osman Mohamed, Si Mati) & Anor [2012] 1 CLJ 923 HC ***(dist)***

Saw Gaik Beow v. Cheong Yew Weng [1989] 1 LNS 75 HC ***(refd)***

Shafeeg Salim Talib and Another v. Fatimah Abud Talib and Others [2010] SGCA 11 ***(refd)***

Tan Swee Lan v. Engku Nik Engku Muda & Ors [1973] 1 LNS 156 FC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 6
Contracts Act 1950, s. 66
Limitation Act 1953, s. 9
National Land Code, ss. 205(1), 214(1)(a), (b)
National Land Code (Penang and Malacca Titles) Act 1963, s. 47(1)
Rules of Court 2012, O. 40A

For the plaintiffs in both suits - Ang Khoon Cheong; M/s CP Ang & Co
For the 1st & 2nd defendants in both suits - Norhisham Shaidi; M/s Norhisham & Co
For the 3rd defendant in both suits - Tan Swee Cheng; M/s SC Tan

Reported by Suhainah Wahiduddin

JUDGMENT

Lim Chong Fong J:

Introduction

[1] The disputes involve the sale of part of undivided share in a piece of land held by a Muslim woman under joint tenancy with her sister who both acquired the land as a gift from their late Muslim father.

[2] The plaintiffs in Penang High Suit No. 22NCVC-429-06-2012 ("Suit 1") are individuals. Likewise, the plaintiffs in Penang High Court Suit no. 22NCVC-567-08/2012 ("Suit 2") (Suit 1 and Suit 2 collectively "suits") are also individuals with the third plaintiff acting as personal representative of the estate of the late Liang Kuan Hoe.

[3] The first defendant ("Khatijah") is also an individual and also acting as the second defendant in representative capacity of the estate of her late sister Aishah binti Md Ibrahim ("Aishah") in both suits too.

[4] The third defendant in both suits is a private limited company registered pursuant to the Companies Act 1965.

Background Facts

[5] By a deed of conveyance dated 26 February 1940 registered as vol. 808, p. 637 no. 160 ("deed"), a R. Govindasamy a/l Rengasamy Naidu sold the piece of land known as Lot No. 3 held under Geran No. 21594, Section 5, Bandar Georgetown, Daerah Timur Laut, Penang ("land") to Mohamed Ibrahim bin Mohamed Eusoff ("Ibrahim").

[6] The deed is reproduced here:

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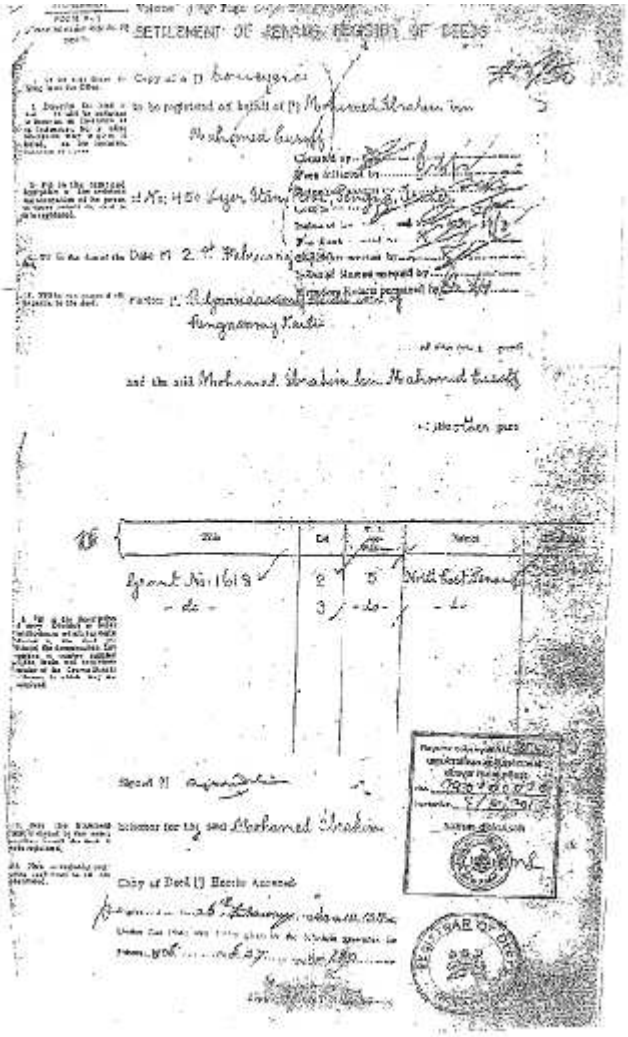
SETTLEMENT OF REVENUE REGISTRY OF DEEDS
Mohamed Ibrahim bin
Mohamed Yusoff
and the said Mohamed Ibrahim bin Mohamed Yusoff
Lot No: 1619
- do -
North East Line
- do -
Mohamed Ibrahim

A

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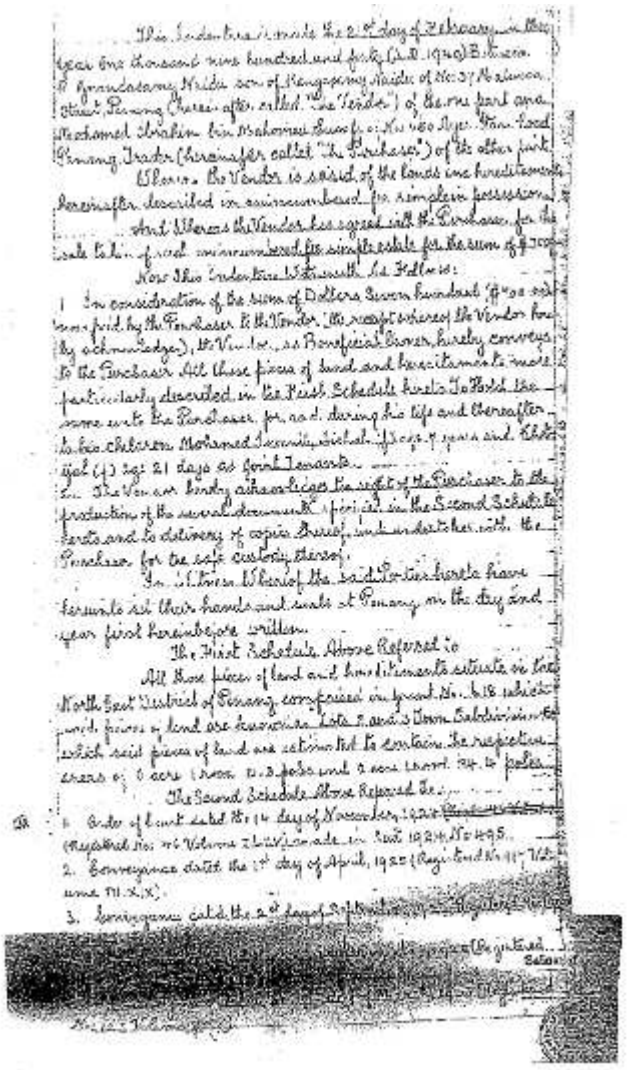

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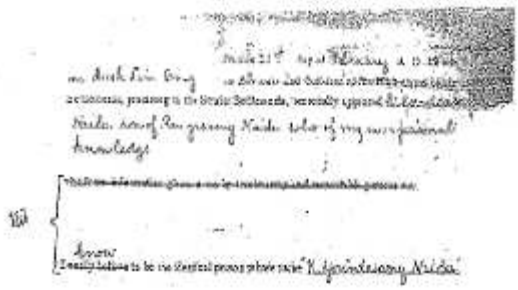

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[7] The material portion of the deed reads as follows:

> In consideration of the sum of Dollars Seven Hundred ($700.00) now paid by the Purchasers to the Vendor (the receipt whereof the Vendor hereby acknowledges), the Vendor, as Beneficial Owner, hereby conveys to the Purchaser All those pieces of land and hereditaments more particularly described in the First Schedule hereto To Hold the same unto the Purchaser for and during his life and thereafter to his children Mohamed Ismail, Aishah (f) aged 7 years and Khatijah (f) of 21 days as Joint Tenants.

[8] After the deed was perfected, Ibrahim took possession of the land. However Ibrahim and his son Mohamed Ismail predeceased Aishah and Khatijah. The sisters then took absolute possession of the land. The land was on 27 June 1977 recorded in the interim register by the Penang Land Titles Board in the names of Aishah and Khatijah as proprietors holding as joint tenants pursuant to the National Land Code (Penang and Malacca Titles) Act 1963.

[9] On 3 February 1990, Aishah unilaterally executed a sale and purchase agreement with the plaintiffs in Suit 2 to sell the portion of the land shaded as Plot no. 9. Furthermore on 17 September 1990, Aishah unilaterally executed another sale and purchase agreement with the plaintiffs in Suit 1 to sell 1,400 sq foot of portion of the land shaded as Plot no. 8.

[10] The plaintiffs in both suits paid the purchase price under the aforesaid sale and purchase agreements in full to Aishah and went into possession of both portions of the land. They erected premises thereon now known as no. 472-A, Jalan Air Itam, 11400 Penang and no. 470, Jalan Air Itam, 11400 Penang respectively.

[11] Aishah died on 4 March 1998 without having completed the transfer and registration of the portions of the land to the plaintiffs. After the demise of Aishah, Khatijah was registered as the sole registered proprietor of the land in 1/1 share.

[12] Consequently, the plaintiffs instituted both suits to principally seek specific performance of their respective sale and purchase agreements.

[13] In the meantime, Khatijah on or about 4 February 2013 sold the land to the third defendant. The sale and purchase agreement was however not executed by Khatijah. In Penang High Court Suit no. 22NCVC-97-06-2014 ("related suit"), the court on 27 February 2015 ordered specific performance of the sale and purchase agreement in favour of the third defendant.

Preliminary

[14] Both suits were originally heard before Nantha Balan J and His Lordship on 27 February 2015 dismissed both suits with costs.

[15] On appeal by the plaintiffs in Civil Appeal No. P-02 (NCVC)(W)-564-04-2015, the Court of Appeal on 9 September 2016 allowed the appeal by setting aside the aforesaid judgment dated 27 February 2015 to be re-tried with expert witnesses called.

[16] The Suits consequently came back before me and at case management, the parties agreed to be bound by the earlier findings of Nantha Balan J on the issues raised by the parties except for the sole principal issue of whether the gift of the land by Ibrahim to this children as joint tenants is subject to Islamic law (known then as Mohammedan law) and accordingly repugnant thereto.

[17] On this premise, I also allowed the intervention of the third defendant in both suits to safeguard its interests in the related suit.

[18] The trial was accordingly reconvened on 15 February 2017 and 11 August 2017 and a sole expert witness on Islamic/Mohammedan law Associate Professor Dr. Jasni bin Sulong ("Dr. Jasni") of the School of Humanities Universiti Sains Malaysia was called by the first and second defendants to give expert evidence. I am satisfied that Dr. Jasni who holds Bachelor (with first class honours), Master and Doctor of Philosophy Degrees in Syariah from the Universiti Malaya is amply qualified and experienced to provide his opinion on this issue. The expert evidence of Dr. Jasni is contained in his affidavits affirmed on 13 January 2017 and 24 July 2017 filed pursuant to O. 40A of the Rules of Court 2012 that was tested under cross-examination by counsel for the plaintiffs at the trial on 15 February 2017 and 11 August 2017.

[19] I also received written submissions and thereafter heard oral clarification from counsel on 26 April 2017, 30 September 2017 and 17 October 2017.

[20] After having duly deliberated on them, I hereby furnish below my decision on the issue together with supporting grounds thereof.

Contentions Of The Parties

[21] The plaintiffs contended that Mohammedan law applied to the gift that is evidenced by the deed. Generally the gift offended Mohammedan law because the nature of the gift itself is neither so recognised nor accepted as *hibah*. They pointed out that there are similarities as well as differences between the Mohammedan concept of *hibah ruqba* as advanced by the defendants in justification of the validity of the gift and the English common law concept of joint tenancy.

[22] According to the plaintiffs, a joint tenancy under common law is created by the act of a person by way of a grant, devise or disseisin. *Hibah ruqba* is however by nature strictly a gift. *Hibah ruqba* is an arrangement between donor and donee but not between donees if there is more than one donee. In a *hibah ruqba*, the donor says to the donee: "If you die before me, the gifted property reverts to me and if I die before you, the property would be yours and your heirs." Upon the death of the donor or the donee and one or the other takes the property absolutely, the *hibah ruqba* is completed.

[23] Pursuant to the deed, the plaintiffs thus submitted that there was at its best a *hibah ruqba* between Ibrahim and his children. It could not be amongst his children because there was no express *hibah ruqba* likewise *inter se*. The plaintiffs therefore contended that there was no evidence of hibah ruqba between them. That notwithstanding, the plaintiffs further submitted that any *hibah ruqba* may nonetheless be severed by any one of them disposing their interest. Hence if there was indeed a *hibah ruqba* between the sisters, Aishah had severed the joint tenancy by selling her interests in the land to the plaintiffs. In this respect, the plaintiffs relied on the Singapore case of *Jack Chia – MPH Ltd v. Malayan Credit Ltd* [1984] 1 CLJ 401; [1984] 2 CLJ (Rep) 630 where the Court of Appeal comprising of Wee Chong Jin CJ, T Kulasekaran J and Lai Kew Chai J held as follows:

> Under Singapore law a joint tenancy can be severed at law so as to create a tenancy in common. This was the position in England before the Law of Property Act 1925 (15 Geo. 5 e. 20) In *Williams v. Hensman* [1861] (1 John & H 546) Sir W. Page Wood VC, at p. 557 said:
>
> A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the *jus accrescend*i. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund - losing, of course, at the same time, his own right of survivorship. Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested.

[24] The plaintiffs finally submitted that the *hibah ruqba* between Ibrahim and his children, if any, is repugnant to Mohammedan law because there was the element of uncertainty (*gharar*) and this was why Zakaria Sam J (now JCA) avoided the joint tenancy arrangement in *Salmah Omar & Ors v. Ahmad Rosli Aziz (Pentadbir Harta Pesaka Osman Mohamed, Si Mati) & Anor* [2012] 1 CLJ 923; [2012] 3 MLJ 567. His Lordship held as follows:

[37] There is also an element of chance in joint tenancy where it is a gamble as to which owner predecease the others before the final survivor becomes the sole owner. This is the basis of gambling and it is prohibited in Islam.

[25] Consequently, the plaintiffs contended that the gift is void under Mohammedan law.

[26] On the other side, the first and second defendants contended that by the deed, Ibrahim made an *inter vivos* gift of the land to his children the beneficiaries. Whilst Ibrahim was still alive, he held the land as trustee during his lifetime for the benefit of the minor children. In other words, Ibrahim had done everything he could to divest himself of ownership of the land by making an express trust and declaring himself as trustee. Since the deed was registered pursuant to the law that was in force at the time, it was therefore an *inter vivos* gift under common law that neither concerned nor attracted Mohammedan law. They referred and relied on the case of *Re Man bin Mihat, Decd.* [1965] 1 LNS 211; [1965] MLJ 1 where Suffian J (later LP) held as follows:

Muslim law rigidly prescribes the share of every heir and no alteration of these shares may be made by will, for a bequest to an heir requires the consent of all co-heirs and a bequest to strangers may not take effect beyond S! of the testator's estate, but there are no restrictions beyond these two limitations. So it is lawful for a Muslim to alter the prescribed shares of his heirs by disposing outright during his lifetime part or the whole of his property to a favoured wife, either directly by way of a gift *inter vivos* or indirectly through trustees. If there is no legal objection to a Muslim altering his heir's share by himself during his lifetime making a gift through trustees to a favoured wife, in my judgment equally there should be no objection in principle to the validity of a similar gift made not by himself but by statute.

Indeed it is quite common for a Muslim to buy land for his minor children and have himself registered in the Land Office records as trustee, though the effect would be to augment the share received by those children in his property after his death. During his lifetime the land is trust property and his death does not alter its character, for thereafter the land remains trust property and his administrator holds it for the purposes of the trust. In my judgment the statutory trust created in favour of the wife in the instant case also retains its character as a trust after his death, and for so long as any object of the trust remains unperformed the trust cannot be defeated and may, if necessary, be enforced by the widow.

[27] Accordingly the first and second defendants submitted that the gift by Ibrahim to his children is therefore good by virtue of the common law that continued to be given effect statutorily by the National Land Code (Penang and Malacca Titles) Act 1963.

[28] The first and second defendants further submitted that even if the gift is subject to Mohammedan law, the gift is nonetheless a valid *hibah ruqba*. A *hibah* is described in the treatise Muslim law: The Personal Laws of Muslims in India and Pakistan (*N M Triphati Private Limited* 4th edn.) by Faizbadurddin Tyabji as follows:

> The legal effect of *hibah* is that the immediate and absolute ownership of the subject of the *hibah* is transferred to the donee; where the property is purported to be transferred by way of *hibah* with conditions or restrictions as to its use, or disposal, or alienation, the conditions or restrictions may be void ... A *ruqba* means a *hibah* (or gift or the absolute ownership of some specified property) with a condition that if the donee survives the donor, the subject of the *hibah* shall belong absolutely to the donee.

Although the first and second defendants conceded that the *hibah ruqba* gift which created the joint tenancy may severed by way of revocation as asserted by the plaintiffs based on the opinion of *Qowl Qadim of Syafie*, the first and second defendants however submitted that both Aishah and Khatijah did not revoke their interests as joint tenants at the material time when they reached adolescence.

[29] The first and second defendants also contended notwithstanding that the element of uncertainty *(gharar)* may prohibit and avoid certain *hibah ruqba* transactions but there are nonetheless exceptions depending upon whether the prohibition is major or minor. They submitted that the chance or uncertainty involved here is minor because it entailed a gift from parent to children.

[30] Finally the first and second defendants pointed out that the courts in other Asian jurisdictions have nonetheless held that an *inter vivos* joint tenancy gift of real property by Muslims is valid as seen in the Singapore Court of Appeal case of *Shafeeg bin Salim Talib and Another v. Fatimah bte Abud bin Talib and Others* [2010] SGCA 11 as well as the Indian cases of *Mohamed Jusab Abdulla v. Fatamabai Jusab Abdulla* AIR (35) 1948 Bombay 53 and *Azizunissa Abdurrahman Kadri v. Jamila Abdul Hussein Sheik (deceased by her LRs) & Ors* [2007] NOC 2238 Bom LR 769.

Findings Of The Court

[31] I will firstly deal with the applicability of Mohammedan law at the point when the deed was executed and perfected in 1940. The plaintiffs referred to the following proposition on reception of English law by Zakaria Sam J (now JCA) in *Salmah bt Omar & Ors v. Ahmad Rosli bin Aziz (administrator of the estate of Osman bin Mohamed, deceased) & Anor (supra)* with emphasis added by me:

[16] Principles of common law and equity were formally introduced in Penang by the first charter of justice in 1807 with the proviso that 'as far as local circumstances will admit'. The British did not apply English law in this country without modification, they stressed 'the need to respect the customary law of the non-British Asian inhabitants who professing different religions, and using and having different religions and using and having different manners, habits, customs, and persuasion, had settled there' – see *Judith Sihombing's National Land Code A Commentary* at p 3. See also *Yeap Cheah Neo and Others v. Ong Cheng Neo* (1875) LR 6 PC 381 at p 392.

[17] English principles were not used when they would not be applicable to the local inhabitants and would cause unfairness and injustice. As observed by Lord Russell of Killowen in *Khoo Hooi Leong v. Khoo Chong Yeok* [1930] AC 346 at p 355, that:

The modifications of the law of England which obtain in the colony in the application of that law to the various alien races established there, arise from the necessity of preventing the injustice or oppression which would ensue if that law were applied to alien races unmodified. That was the view expressed by Sir Peter Maxwell CJ in *Choa Choon Neo v. Spottiswoode*; and this Board in *Yeap Cheah Neo v. Ong Cheng Neo*, stated that in Sir Peter Maxwell's judgment. 'The rules of English law and the degree in which, in cases of this kind, regard should be had to the habits and usages of the various people residing in the colony are correctly stated'.

[18] This principle was given statutory force in the proviso to s. 3 of the Civil Law Act 1956 which provides that:

The said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualification as local circumstances render necessary.

The plaintiffs also referred to the book *Principles of Malaysia Land Law* (LexisNexis) by Ainul, Sharifah, Bashiran, Fauziah, Nor Aishah, Azlinor and Ratna that:

Historical records show that the principles of Islamic law and adat were already present in some of the State laws of the time, even before the arrival of the English traders. These were the Malacca Laws of 1523, The Pahang Laws of 1596, The Kedah Laws of 1605, The Johor Laws of 1789, The Perak Code and the Ninety-Nine Laws of Perak 1765. The Malay States were full sovereign States having their own systems of law and administration. As such the words of Sir Montaque Smith that when Penang was first ceded by the Sultan of Kedah there was no trace of any laws having been established there needs to be further examined in the new light. The truth of the matter was that before the arrival of the English traders, the Malay peninsula (as Malaysia was then known) was already governed by Islamic law fused with local custom in respect of wide range of matters affecting the entire spectrum of the life of the local inhabitants.

[32] The defendants referred to the Annotated Statutes on the National Land Code (Penang and Malacca Titles) Act 1963 (Issue 71 by LexisNexis) that provides as follows with emphasis added by me:

> **Early Land law in Penang**
>
> **Background and the deed system**
>
> Penang island was originally part of the state of Kedah, which was ruled by a Muslim Sultan. It was occupied by the East India Company, a representative of the British Crown in the region, through negotiations between the Sultan of Kedah and Francis Light in 1786 (the negotiations concerned the Sultan seeking military assistance from the British Government to protect the state from any attacks by the Siamese). The Sultan finally gave the Island of Penang and Province Wellesley to the British Government through three Charters of Justice.
>
> It has been said that there was no evidence of any law prevailing in Penang at the time the British arrived. Salleh Buang was of the view that Islamic law and Malay custom was in practice in Penang at that time. However, see *Judith Sihombing National Land Code, A Commentary* (2nd Edition, 1992) where it was stated that there is no trace of any law prevailing in Penang prior to the occupation by the East India Company, although the same author states in 8 Halsbury Laws of Malaysia Land (2003 Reissue) (Original Title Scheme) [150:050] that: '[i]n 1786 the population of the island was sparse, and it is assumed that if any law applied to the occupation of land that law was Malay customary law'
>
> According to the British, there was no formal land law in the state of Penang at the time the East India Company occupied the state. In *Ong Cheng Neo v. Yeap Cheah Neo* (1872) Kyshe 326, the Privy Council was of the view that: 'In either view, the law of England must be taken to be the governing law, so far as it is applicable to the circumstances of the place court held that the island was wholly inhabited when the British arrived, thus the English law should be applicable.
>
> (3) Effect on Customary Land:
>
> The Act also make provision for customary land which was owned pursuant to Adat Naning, a modification of Adat Perpateh customary tenure, to be entered in a special Mukim Register referred to as the Malacca Customary Land Register. Sections 94-109A of the Act provide for dealings as well as continued recognition and preservation of customary lands in Malacca. Titles in continuation (subject to the provisions of National Land Code 1965 (Act 56 of 1965) ((1) 3 Lands)) are to be issued to land held under the Malacca Customary Land Register. These provisions are applicable only in the state of Malacca and not to the state of Penang. This is due to historical reasons whereby there was customary land tenure in existence when the colonial masters came to Malacca, unlike Penang which was said to be an uninhabited island when the British arrived: see *Ong Cheng New v. Yeap Cheah Neo* (1872) Kyshe 326. See also *8 Halsbury's Laws of Malaysia Land* (2003 Reissue) (Original Title Scheme) [150.537].

[33] I find the narrative in *Salmah bt Omar & Ors v. Ahmad Rosli bin Aziz (administrator of the estate of Osman bin Mohamed, deceased) & Anor (supra)* as well as commentary in the Annotated Statutes helpful. They are not contradictory. I gather that upon initial arrival of the British, the island of Penang was uninhabited and thus English law was wholly applicable. However as the island became inhabited and populated over time, the application of English law became subject to appropriate modification to cater for the customs of the alien races including the Muslims that began to occupy the island in the early years of British Malaya. This is made clear by the Privy Council in *Khoo Hooi Leong v. Khoo Chong Yeok* [1930] AC 346.

[34] However by 1940, the States in Malaya were firmly under British rule particularly in the Straits Settlements such as Penang that apply mostly English law. There were many ordinances then already in force as Laws of the Straits Settlements 1936. For purposes of the suits, the relevant Ordinances are in my view as follows:

(i) S.S. Cap. 42 Civil Law Ordinance;

(ii) S.S. Cap. 57 Mohammedans Ordinance;

(iii) S.S. Cap.118 Conveyancing and Law of Property Ordinance; and

(iv) S.S. Cap. 121 Registration of Deeds Ordinance.

[35] The relevant provision pursuant to the Civil Law Ordinance is s. 5(2) that reads:

> **5. Law of England to be observed in all commercial matters**
>
> (2) Nothing herein shall be taken to introduce into the Colony any part of the law of England relating to the tenure or conveyance, or assurance of, or succession to, any immovable property, or any estate, right or interest thereto.

[36] The Conveyancing and Law of Property Ordinance provides in s. 58(1) as follows:

> **58. Effect of covenant with two or more jointly**
>
> (1) A covenant, and a contract under seal, and a bond or obligation, made with two or more jointly, to pay money or make a conveyance, or to do any other act, to do them for their benefit, shall be deemed to include, and shall by virtue of this Ordinance, imply, an obligation to do the act to, or for the benefit of, the survivor or the survivors of them, and to, or the benefit of, any other person to whom the right to sue on the covenant, contract, bond or obligation devolves.

[37] Now as to the Mohammedan Ordinance, it is provided in the preamble as follows:

A To consolidate and amend the law relating to Mohammedans, and to provide for the registration of marriages and divorces among Mohammedans.

[38] It is further provided as follows in s. 26 of Part III of the Mohammedan Ordinance in relation to property:

B **26. Modification of law**

(1) The modifications of the laws of property to be recognized in the case of Mohammedan marriages shall be as enacted in this Ordinance.

(2) Mohammedan law in the absence of special contract between the C parties shall be recognised by the Courts of the Colony only so far as expressly enacted in this Ordinance.

(3) Nothing in this Ordinance contained shall be held to prevent any Mohammedan person directing by his or her will that his or her estate and effects shall be administered according to Mohammedan law.

D **[39]** Upon my careful reading of the deed, I am of the view that Ibrahim purchased the land and at that same time conveyed the land to his children Mohamed Ismail, Aishah and Khatijah as joint tenants after his demise. During Ibrahim's lifetime, the land was held by him as trustee for the children. Put simply, it is a voluntary *inter vivos* gift coupled with a trust for E the benefit of his minor children jointly held under joint tenancy ("conveyance"). The three children of Ibrahim took absolute possession of the land after his death. After the death of the eldest son Mohammed Ismail, the land was registered in both Aishah and Khatijahs' name as joint tenants as evidenced by the endorsement in the interim register dated 27 June 1977. F Subsequently after Aishah's death, the land became finally registered in Khatijah's name with 1/1 share as evidenced by the issued document of title dated 19 July 2012. It is provided in s. 47(1) of the National Land Code (Penang and Malacca Titles) Act 1963 as follows:

47. Estates in absolute possession

G (1) Where a pre-existing estate in absolute possession in any holding is vested:

(a) in any person, such person shall, subject to paragraphs (b) and (c), be registered in the Interim Register as the proprietor thereof;

(b) in two or more persons as tenants in common, such persons shall H be registered in the Interim Register as proprietors of undivided shares therein, proportionate to the pre-existing interest of each such person;

(c) in two or more persons as joint tenants, such persons shall be registered in the Interim Register as co-proprietors thereof, "with a I right of survivorship.

[40] From my review of the provisions in the Mohammedan Ordinance that had codified customary law applicable to the Muslims, it is plain to me that Mohammedan law did not apply to the conveyance and I so find and hold accordingly. I find that at the time Mohammedan law only applied to property relating to Mohammedan marriage and intestacy. I am fortified by the aforequoted judgment of Suffian J (later LP) in *Re Man bin Mihat, Decd. (supra)* where settled property held in trust was found not to be subjected to Mohammedan law too.

[41] In the circumstances, I therefore find that the conveyance was at the time solely governed by English law based on the Conveyancing and Law of Property Ordinance and Registration of Deeds Ordinance. Accordingly and in the light of s. 5(2) of the Civil Law Ordinance, I further hold that the English common law principle of alienation *rei praefertur juri accresendi* on severance of joint tenancy relied by the plaintiffs is inapplicable because this principle wasn't embodied in the aforesaid Ordinances. This position remains unaltered by their successor statutes, *to wit*: the National Land Code 1965 and National Land Code (Penang and Malacca Titles) Act 1963 as well as s. 6 of the Civil Law Act 1956 that reads:

> **6. Immovable property**
>
> Nothing in this Part shall be taken to introduce into Malaysia or any of the States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein.

[42] I now move to consider briefly the effect of Mohammedan law on the Conveyance *albeit* it is strictly speaking unnecessary since I have held that Mohammedan law is inapplicable thereto.

[43] The defendants in gist submitted that the conveyance is a *hibah ruqba* relying on the expert opinion of Dr. Jasni who opined as follows:

> Ownership of property is a right recognised in Islam and ought to be enjoyed by every Muslim. In the case of joint ownership, it always refers to the concept of *sharikah* or *shirkah*, where more than one person share ownership upon a property as co-owner. However the kind of *sharikah* is varied upon structure of the sharing, which is based on either, an agreement in establishing a *shirkah* or in the form of acquisition such as a gift ... Meanwhile if a property is transferred to one or more by form of gift (*hibah*), the property is belonging to the donee or donees. Normally, a gift (*hibah*) in Islam is referring to a deed that purported to transfer a property from donor to donee without any reward or condition. This kind of gift was permitted in Islamic law by following the rule and principle, such as gift should be transfer during life time and it cannot be withdrawn except from parent to their children. The donee can hold it exclusively as a sole owner (if alone), or together with co-owner in form of Arabic partial share (*shirkah*) or undivided share (*musha*). The word *musha* is derived

A from Arabic word which literally means "confusion", and in this case, means undivided share or part in joint property. According to Hanafiyyah, a gift of undivided share by one co-heir to the other is valid. In *shariah*, this kind of gift is known as *hibah* and *hibah* is considered completed once the donee received the given property (*qabd*) ...

B However in the case of conditional gift, Islamic jurist have different views on its validity. There are long discussion about conditional gift in shariah under the topic of *umra* and *ruqba*. To make it short, there are conflict sources in Islamic jurisprudence (dalil) about *umra* and *ruqba*, whereby there are dalil which authorised them, as well as dalil that in contrary. *Umra* means a gift during the life of the donee or donor with a condition C that the property is returned after the death of the hibah recipient. Meanwhile *ruqba* on the other hand, is a gift which puts death of either the *hibah* provider or recipient as the condition of *hibah* ownership to the living party. In other words, *ruqba* means each of the co-joint anticipates and waits for the death of another co-joint so that the donated item would come back to him.

D Based on the above explanation, it seems that the concept of joint tenancy is identical to *hibah ruqba*. The word hibah, means gift and word ruqba, means survivorship (the donated item would come back to the co-joint who survives) ...

E **[44]** As to whether a gift conditional upon it being held on joint tenancy as is the case of the conveyance offending Islamic law, Dr. Jasni opined as follows:

Even though Muslim jurists have been conflicted in authorising the *hibah ruqba* (joint tenancy) but in term of hibah/gift *per se*, they predominantly are of the view on permitting the gift once method of the *hibah* is fulfilled.

F In Islamic law also, in a special case such as to benefit some heirs or to prevent any harm to the asset, as long, as there are opinion among opinions of Muslim scholars that permitting the act, the act is still considered to have some legal authorisations. So do the joint tenants or *hibah ruqba*, there are views among Islamic jurists who authorised the G method of gift, among other opinions, even though they are from minority views at that time but the views have their own stands. It was recorded from al-Sayuti, the wisdom in forbidding *ruqba* (condition) among majority of Muslim jurists was based on the fact that a hibah is not revocable after a gift is solemnized. Therefore, it is contradict to the concept of *hibah*/gift if the donor puts a condition to own the gift back H after the donee's death. However, the case is dissimilar in the gift from parent to their children, as Syariah underlines that it is revocable. Therefore, the point of forbidding the condition is in line with Syariah and therefore, the *hibah* ruqba should be authorised ...

I

The tendency that authorizes joint tenants among Muslim in Malaysia had happened a long time ago in India, where a gift by one co-heir to the other (in the form of joint tenancy) was valid and authorized by the Privy Council.

[45] In respect of the element of uncertainty inherent in the conveyance, Dr. Jasni opined as follows:

The element of uncertainty (*gharar*) in this case is very minor, that is, it is unclear who will become the last owner/survivor between Aishah and Khatijah to own the property. However, it was certain that the whole property will be owned only by the generation of Mohamed Ibrahim if one of them died ...

Even though the *hibah* will deprive other heirs from inheritance, but the legality of *hibah* standing as an alternative plan of estate preparation among Muslim heirs. In this case, there is no issue of depriving other heirs from inheritance as Aishah is unaided without husband and son. Furthermore Khatijah is her only heir. Therefore, under joint tenancy, her property will be survived by Khatijah (the whole) instead of under inheritance, her property will be inherited by Khatijah (half), and the other (1/2) half goes to Baitulmal ...

Yes, there is an element of chance in joint tenancy. However, the form of chance can be divided into two, either excessive chance/gamble or only minor. In Islam, gambling is forbidden if it was put on luck and fortune *per se*. However, if the gambling was put on effort such as in doing business, one may take risk either to gain profit or lost, the kind of risk undertaking is permitted.

In the case of joint tenancy, I see that the gambling on who will succeed to own the property is not an ultimate issue, but the goal is more on to safeguard the well being of beneficiaries of family assets. The risk that takes place in the survivorship is in the mode of minor risk (*gharar yasir*) and not the excessive (*gharar fahish*). Islamic law permits *gharar yasir* in transaction but not an excessive. Generally, a form of gambling/chance always exists in Muslim transaction, for instance, the condition of fruit that we buy, etc, as well as we don't know the time we will die.

Therefore in the case of joint tenancy among siblings, yes there is a point of chance, but only to be a minor *gharar*. Moreover, the holding was made during young age and for their benefit in order to safeguard the property from being vested into Baitumal (public treasury).

[46] I find the views of Dr. Jasni rational and cogent. The plaintiffs did not call another expert on Islamic law with contrary views. Dr. Jasni was also unshaken under cross-examination and he held steadfastly to his opinion with convincing explanation particularly on the inapplicability of the element of uncertainty (*gharar*) to the facts herein. In the circumstances, there is no reason for me not to accept Dr. Jasni's opinion in entirety.

[47] I further hold that the case of *Salmah bt Omar & Ors v. Ahmad Rosli bin Aziz (administrator of the estate of Osman bin Mohamed, deceased) & Anor (supra)* that was heavily relied upon by the plaintiffs distinguishable in that it did not concern an *inter vivos* gift and/or trust. It is also primarily a dispute arising from intestacy of both joint tenants that arguably attracted the application of Islamic law.

[48] As to severance of the *hibah ruqba* based on the opinion of Qowl Qadim of Syafie as further submitted by the plaintiffs, there was however no evidence adduced by the plaintiffs that Aishah took action to sever it when she reached adolescence. In this regard, Dr. Jasni made in clear at the trial that any act of severance has to be done overtly when Ibrahim's children reached adolescence.

[49] I therefore find and hold that the conveyance as well as the joint tenancy that was created are neither avoided nor defeated by Mohammedan law even if that applies to the transaction.

Summary And Conclusion

[50] Following the consent of the parties as set out in para. 15 above, I hold the following as previously found by Nantha Balan J in respect of the other issues to be determined:

(i) As to the severance of the joint tenancy (and in addition to my finding in para. 40 that the English law principle of severance of joint tenancy is inapplicable under Malaysian land law), the unilateral act of Aishah entering into sale and purchase agreements with the plaintiffs did not amount to severance because she did not take formal steps to divest and sever her interests from the joint tenancy by the act of partition of the land and thereafter registration in the names of the plaintiffs' of their portions of the land. Furthermore there was no consent to the same by Khatijah. There were also no records that the Director of Land and Mines recognised that severance of the joint tenancy had been made to the title of the land.

(ii) Both suits are not time-barred as the result of s. 9 of the Limitation Act 1953 by reason that the right to commence the actions by the plaintiffs accrued when there is a threat to infringe their rights following *Ng Moh v. Tan Bok Kim & Anor* [1968] 1 LNS 88; [1969] 1 MLJ 46, *Tan Swee Lan v. Engku Nik Engku Muda & Ors* [1973] 1 LNS 156; [1973] 2 MLJ 187 and *Saw Gaik Beow v. Cheong Yew Weng & Ors* [1989] 1 LNS 75; [1989] 3 MLJ 301. The threat of infringement to the plaintiffs' rights were only communicated to them *via* Khatijah's solicitor's letter of demand dated 23 March 2012 and the subsequent initiation of the suits were well within the limitation period.

(iii) The sale and purchase agreements entered between the plaintiffs and Aishah are not capable of being effected under the National Land Code by reason that ss. 205(1) and 214(1) (a) and (b) thereof do not permit the transfer of a part of any undivided share in the land. Furthermore, Aishah's undivided interest has now been assimilated and merged into a single interest owned by Khatijah as the sole survivor under the joint tenancy.

[51] I find and hold that Mohammedan law does not apply to the Conveyance and even if Mohammedan law applies, the conveyance being a *hibah ruqba* does not contravene Mohammedan law.

[52] In the circumstances, it is clear that the plaintiffs' claims against the first defendant are unsustainable. However as for the second defendant, the sale of part of the undivided share of the land could not be effected; the agreement between the plaintiffs and Aishah in respect of the purchase of that portion of the land is thus void. Consequently by reason of s. 66 of the Contracts Act 1950, the estate of Aishah as represented by the second defendant has to restore the benefit or advantage received from the plaintiffs: see *Menaka v. Lum Kum Chum* [1976] 1 LNS 181; [1977] 1 MLJ 91.

[53] For the reason as adumbrated above, I therefore hold that the plaintiffs' claim in both suits for specific performance, declarations, injunction and damages in addition to or *in lieu* of specific performance, etc. are untenable in law. That notwithstanding, I hold that the plaintiffs may however claim from the second defendant only for the restoration of the benefits and advantage received, other wise to make compensation for it.

[54] The plaintiffs' claims in Suit 1 against the first defendant are therefore dismissed but I enter judgment for the plaintiffs in Suit 1 against the second defendant for the restoration of benefits or advantage received, otherwise to compensate the plaintiffs to be assessed by the Registrar. Likewise the plaintiffs' claims in Suit 2 against the first defendant are dismissed but I also enter judgment for the plaintiffs in Suit 2 against the second defendant for the restoration of benefits or advantage received, otherwise to compensate the plaintiffs to be assessed by the Registrar.

[55] In the circumstances herein where there is partial success on both sides, I order that each party shall bear his/her/its own costs.